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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. _____

Supreme Court, U. S.
FILED
MAR 13 1972
MICHAEL RODAK, JR., CLERK

Willodean Forks
Conrad Forks
Kaleen Kehoe
Richard L. Kehoe, Jr.
Stephen M. Kerr
Lynn K. Coyle
William M. Coyle
Mary C. Grover, Petitioners,

v.

City of Warsaw, Indiana, Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

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Mary C. Grover, Petitioners,

v.

City of Warsaw, Indiana, Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Indiana entered in the above entitled cause on October 19, 1971, petition for rehearing denied on December 15, 1971.

Opinion Below

The opinion of the Supreme Court of Indiana affirmed the judgment of the Kosciusko Circuit Court, Indiana; is reported in 273 NE2d 856, and appears in Appendix A.

Jurisdiction

The judgment of the Supreme Court of Indiana was entered on October 19, 1971, petition for rehearing denied on December 15, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statute Involved

Legislative acts of the Indiana legislature involved are: § 48-701 and § 48-702 of the 1963 Replacement Volume 9, Part 1, of Burns Indiana Statutes, being section 1 and 3 respectively of Chapter 269 of the Acts of the General Assembly of Indiana for the year 1955; appear in Tr. pp. 31-37.

Provision of the United States Constitution Involved

The provision of the United States Constitution involved is the following part of §1 of Amendment 14: "Nor shall any state deprive ***; nor deny to any person within its jurisdiction the equal protection of the laws".

Question Presented

The question presented is whether or not the said sections of the Indiana Statutes are violative of the said provisions of §1 of Amendment 14 of the United States Constitution in denying to

the petitioners the privilege of remonstrating against ordinance no. 535 of the respondent City of Warsaw, Indiana, seeking to annex territory of which the petitioners are permanent residents and qualified voters and in which they do not own real estate but do own personal property, tangible and intangible, of substantial value located in the said territory and who are citizens of the United States and of the State of Indiana, while the said sections of the Indiana statute, at the same time, grant the privilege of such remonstrance solely to owners of real estate located in the said territory, whether or not such landowners reside in the said territory permanently, temporarily, or not at all.

Bearing upon such question are the questions:

(1) Whether or not the said sections of the Indiana statutes present a classification which on its face is arbitrary (Smith v. Cahoon, 283 U.S. 553, 567, 75 L. ed. 1264, 1269, 51 S. Ct. 582) or that may appear by facts admitted or proved. Southern R. Co. v. Greene, 216 U.S. 400, 417, 54 L. ed. 536, 541, 30 S. Ct. 287, 17 Ann. Cas. 1247; Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71, 85, 69 L. ed. 169, 177, 45 S. Ct. 12; Concordia F. Ins. Co. v. Illinois, 292 U.S. 535, 549, 78 L. ed. 1411, 1420, 54 S. Ct. 830; or

(2) Whether or not the judgment should be reversed and the cause remanded for hearing of evidence on the allegations

of the complaint. Borden's Farm Products Co., Appellant v. Baldwin (1934), 293 U.S. 194-213, 79 L. ed. 281, 289; and

(3) Whether or not the details of the so-called remonstrative process set out in the said § 48-702 of the Burns Indiana Statutes in substance constitute an elective process comparable to those involved in the cases of Morris M. Kramer v. Union Free School District No. 15 (June 16, 1969) 395 U.S. 621, 23 L. ed. 2d 583, 89 S. Ct., 1886, and Cipriano v. Houma (June 16, 1969), 395 U.S. 701, 23 L. ed. 2d 647, 89 S. Ct. 1897, and, if so,

(4) Whether or not such remonstrative process (also elective process) is subject to the same, or equally discriminatory, effects as those of the statutes found violative of the equal protection of the laws clause in the said Kramer and Cipriano cases, supra; and, if so

(5) Whether or not the exclusion of the petitioners from the right to remonstrate (to vote against annexation) was necessary to protect a compelling state interest. Kramer and Cipriano cases, supra.

Statement

The Indiana statute here involved, in providing a method for annexation of territory by cities by ordinance subject to conditions, granted the right of remonstrance solely to owners of the real

estate located in the territory sought to be annexed (Tr. pp. 31-37). In the event a majority of such landowners did not remonstrate, the ordinance became effective. In the event a majority of such land owners remonstrated, annexation did not take place unless the Court in which the remonstrance was filed, found, upon trial of the remonstrance, that certain "determinants" as specified in the statute, existed. Where a tract of land was owned by more than one person, only one of such persons was entitled to be counted as a remonstrator. The judge of the court in which the remonstrance was filed determined the total number of landowners qualified to remonstrate, and the number remonstrating.

In their complaint seeking to set aside the ordinance no. 535 of the City of Warsaw to annex territory, the petitioners alleged that they owned no real estate in the territory, but that they were and had been for several years residents and registered voters of the territory, and owners and occupants of mobile homes, and owners of other personal property, both tangible and intangible, in the territory, and alleged in detail their interests in, and the effects of, annexation, upon them; that they were just as much, if not more, interested in, and affected by, the annexation sought, as were the owners of the real estate located in the territory; that there were only seven owners

of the real estate in the territory and that three only had remonstrated, less than the majority required to compel the prerequisite finding by the Court of the existence of the "determinants" for annexation; and alleged the conclusion that the statute's denial of the privilege of remonstrance to them while granting it to owners of real estate was clearly an arbitrary classification, and an irrational discrimination against them. Petitioners further alleged that the statute violated the equal protection of the laws clause of §1 of Amendment 14 of the United States Constitution, not only in that the classification was clearly arbitrary and without rational basis, on its face, which removed the presumption of the statute's validity, but also by the removal of such presumption otherwise by the fact that the remonstrative process set up by the statute was in substance also an elective process.

The petitioners initiated their proceedings against the respondent City of Warsaw in the Kosciusko Circuit Court at Warsaw, Indiana, on March 29, 1969, and filed therein their amended and supplemental complaint on November 21, 1970. Petitioners' complaint (their second amended and supplemental) appears at pages 42, 43 and 44 and at 63, 64 and 65 of the original transcript now on file in the Office of the Clerk of this Court. The respondent City moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could

be granted (Tr. p. 39). The Kosciusko Circuit Court, by special judge, sustained the motion to dismiss on December 3, 1970 (T. p. 40). Petitioners filed motion to correct error on December 23, 1970 (Tr. pp. 42-46), which the special judge overruled on December 29, 1970 (Tr p. 65). Petitioners appealed to the Supreme Court of Indiana assigning as error the overruling of the motion to correct error. The Supreme Court of Indiana affirmed the ruling of the Court below (Appendix A), one member of the Court writing a separate opinion of which the first paragraph states the gist as follows:

> "If appellants had objected to the summary procedure adopted by the trial court, either in the trial court or in their brief on appeal, I would vote to remand this case to the trial court for a full trial. In every case dealing with a constitutional claim, an unrestricted opportunity should be afforded the litigants to completely present the facts neccessary to support their claims. However, in my view of the record and briefs in this case, appellants have never contended that the trial court committed error in making a summary disposition of their constitutional claim. Thus, because of the posture of this case, I would concur in the result of the majority opinion wherein it holds that the trial court did not commit error in this case by following a summary type procedure."

Pertinent parts of Trial Rules 12 and 56 of the Indiana Supreme Court, governing procedure on motions to dismiss and for summary judgment appear in Appendix B.

Errors of Fact in Opinion Below

Before consideration of the conclusions of both the majority and minority opinions, we should point out the following errors of fact clearly appearing therein:

(1) The fifth sentence beginning with "The prayer of appellants' complaint" casts the definite implication that the owners of the real estate in the territory sought to be annexed were residents of such territory. The complaint did not so allege.

(2) The second paragraph of the opinion casts the definite implication that the facts stated in the first paragraph of the opinion to-wit, that petitioners owned no real estate in the territory sought to be annexed but did own mobile homes and personal property, tangible and intangible, in the territory, and that the Indiana statute provided for remonstrance by owners of real estate only, were the only facts alleged in the complaint. However the complaint alleged many other facts, among which were that for several years last past the petitioners had been and were then citizens of Indiana and of the United States of America and registered voters of the territory sought to be annexed, and throughout such

period they had owned, and then owned, personal property, tangible and intangible, including mobile homes assessed and taxed as personal property and occupied by them, that such personal property was then and had been continuously of substantial value; that all petitioners were as much or more interested in, the attempted annexation as were the owners of the real estate located and taxable in the territory; that petitioners' residences in the territory had been as long and continuous on the average as the residences and ownership of real estate by resident owners thereof, and that the petitioners' ownership of personal property in the territory had been longer than the average time of the ownership of real estate in the territory by non-residents thereof. Other facts in detail were alleged in the succeeding rhetorical paragraphs 6 to 10 inclusive of the complaint (Tr. pp 47 - 54).

(3) In the third paragraph of the opinion (Appendix A,p. v) it is stated that "Inhabitants who do not own land are more likely to be temporary residents whereas landowners have a greater tendency to be permanent residents". The complaint alleged the contrary, supra.

(4) In the fifth paragraph of the opinion it is stated (Appendix A, p. vii):

> "Appellants next contend that the remonstrance provided for in the statute is an election for a special purpose and as such denies the appellants, who are registered voters, equal protection of the law."

The statement implies that petitioners based their position solely on the ground that they were registered voters of the territory sought to be annexed. However the complaint alleged that the Indiana Statute had denied them the equal protection of the law not only as such registered voters of the territory but also as owners of personal property only, including mobile homes owned and occupied by them in the territory, and as citizens of Indiana and of the United States within the jurisdiction of Indiana (Tr. p. 53).

(5) The statement in the fifth paragraph of the opinion that "a remonstrance is not an election in any sense of the word" (Appendix A, p. viii), is palpably incorrect. In §48-702 the process was a "choosing or selection, by those having the right to participate, *** of public measures which shall be adopted or rejected". 25 AM Jur 2d, 691, Elections, §1. In Ballantine's Law Dictionary (1930), the following meanings are given to the word "vote":

> "suffrage, voice, or choice of a person for or against a measure;"

and an "elector" is a:

> "technical generic term, descriptive of a citizen having constitutional and statutory qualification that enables him to vote, and including not only those who vote, but also those who are qualified, yet fail to exercise the franchise".;

and an "elective franchise" is defined as:

> "the right to vote at an election; the right of suffrage; it is not a natural right or a civil right, but

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> a privilege conferred upon the person by the constitution and the laws of the State. It is rather a privilege than a right and is dependent upon public policy. It has been called a political right."

All of the elements of an election for a special purpose were provided in the statute in question here. It is immaterial that the word "election" does not appear in the statute. Nor does it matter what name is given to the proceedings. It may be a "referendum" or a "remonstrance". It is the substance that counts. Morris v. Powell (1890), 125 Ind. 281, 25 NE 221.

In the case of Taggart, Auditor v. Claypool (1896), 145 Ind. 590, 44 NE 18, where the 1891 annexation statute required remonstrance of 75% of the resident freeholders, the Court's opinion recognized the procedure (the remonstrance) as a method of determining the "voice" of the resident landowners, and compared the non-resident landowners' lack of right to remonstrate to his lack of right "to vote on a local school tax levy in his territory". In the instant case, the remonstrance was a "voice" or "vote" in rejection of a public measure, within the definition of "election" - 25 AM JUR 2d, 691, supra. In the Taggart case all resident landowners were "electors" as defined in Ballantine, supra; and in § 48-702 all landowners, both resident and non-resident, are electors, with limitation as to the method of count thereof as provided by the statute. The judge is the election board, bound by the method

of counting as specifically provided by the statute. It does not matter in what form the "voice" or "vote" is cast.

(6) In the last sentence of the second paragraph of the majority opinion it is stated that the case was summarily disposed of upon the pleadings (Appendix A, p. iv); and in the last sentence of the first paragraph of the minority opinion it is also stated that the trial court followed a summary type procedure (Appendix A, P. ix). Such was clearly not the fact. Matters outside the pleading were not presented to the trial court. Indeed, the opinion itself says in the second paragraph:

> "Appellants first claim the trial court erred in sustaining the motion to dismiss claiming that if a case is well pleaded, judgment should be made on the basis of the facts presented. However, in the case at bar there is no contest of the facts. The facts are completely presented by appellants' complaint and the exhibits attached thereto. These facts are quite simple and are not contested by the appellee". (Appendix A, p. iii)."

Neither the petitioners nor the respondent City filed motion for summary judgment with or without supporting affidavits. See Appendix B. The disposition was clearly not summary, but was the same as a sustaining of a demurrer to a complaint with the complainant refusing to plead over. Such was the clear implication of the peti-

tioners' motion to correct error in which the sustaining of the motion to dismiss was the error claimed. The trial court was obviously following the comments of the State of Indiana Civil Code Study Commission in its trial draft of Indiana Rules of Civil Procedure of August 6, 1968, as follows:

> "Rule 12 (b) (6). The motion to dismiss for failure to state a claim upon which relief can be granted serves basically the same function of the demurrer under the prior practice, that is, to test the legal sufficiency of the complaint. Unlike the prior practice, however, the new rules do not require that the complaint state all the elements of a cause of action. As stated by one federal court, 'Our duty...is to consider whether in the light most favorable to the plaintiff, with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim.' Tahir Erk v. Glen L. Martin Co., 116 F 2d 865 (4th Cir. 1941). Thus, the motion to dismiss usually will be sustained only when it is clear that under no conditions can the plaintiff recover, as would occur in a case in which the statute of limitations has run." "***."

together with the earlier case of Heckler v. Conter, Treas., et al (1933), 206 Ind. 376, 187 NE 878, wherein the opinion of the Supreme Court of Indiana reads as follows:

"Appellant brought this action seeking a judgment declaring Chapter 31, p. 153, of the Acts of 1933, unconstitutional. A demurrer to the complaint was sustained, and, upon refusal to plead further, there was judgment against appellant, from which this appeal is prosecuted.

"The only error assigned is upon the ruling on the demurrer, and the only questions presented involve the constitutionality of the act." "***."

"The law in question isolates three second class cities and one fourth class city. No reason is suggested or apparent why their situation is such that the country treasurer in the county in which they are located should collect their taxes and maintain a branch office within their confines that does not apply to every second or fourth class city in the state. *** The classification cannot stand the test. ***

"*** We conclude that the act is unconstitutional because in conflict with the provisions of Section 23 of Article 4 of the Constitution, and, in view of this conclusion, it is unnecessary to consider the other questions presented.

"The judgment is reversed, with instructions to the trial court to

overrule the demurrer, and for further proceedings not inconsistent with this opinion."

If the law was to the contrary in Indiana at the time the trial judge sustained the City's motion to dismiss the complaint in the case at bar, we have been unable to find any evidence of it.

Why the Petition for Writ of Certiorari Should be Granted

We shall take up the questions presented, supra, in the order in which we believe that the petitioners' position may be the strongest (although, of course, we believe all of our positions are sound).

Our first contention is (in answer to questions (3) and (4), p. 4, supra,) that § 48-702 of Burns Indiana Statutes provides an elective process for the choosing, by those having a right to participate, of a public measure which shall be adopted or rejected, and that such process is violative of the protection of the laws clause in the same manner and degree as the elective processes struck down by this Court in the Kramer and Cipriano cases, supra, the summaries of which appear in appendices C and D. Of course the statute's method of determining the will of the majority is not an "election" within definition given in the Indiana Election Code for the purpose of that code (Appendix E); but such election code does not purport to cover "elections" universally. The provisions of §48-702 do come within the definition

of elections in 25 Am. Jur. 2d 691, Elections, §1, supra, p.10 . Actually it would seem that the majority opinion admits such to be the case in its statement as follows:

> "we therefore hold that the right to remonstrate is not an election to the extent that all voters in the community must be afforded the opportunity to participate" (Appendix A, p. viii)

Such holding has as its underlying premise that the provisions of §48-702 do constitute an election, and is saying that such provisions however are not an election as defined by the Indiana Election Code. We agree, of course, that such conclusion is correct; and thereby supports the position that §48-702 may not be presumed to have a rational basis for the discrimination appearing therein; a discrimination even more glaring than the Kramer and Cipriano cases in the fact that under the provisions of §48-702, those failing to remonstrate (to vote against annexation) are unrealistically counted in favor thereof, whereas in the Kramer and Cipriano cases, it was the majority of those voting who prevailed. We therefore respectfully submit that the §48-702 does constitute an elective process very closely comparable to those involved in the Kramer and Cipriano cases.

We contend next (in answer to question (5), p. 4, supra) that the exclusion of the petitioners from the right to remonstrate (to vote against annexation) was not necessary to protect a compelling state interest." The only justification for the statute in the opinion is that

the limitation of the privilege of remonstrance to landowners was:

> "There can be no question but that annexation affects all persons residing within the territory. However, there are substantial differences which warrant the legislative classification in the statute in question. Inhabitants who do not own land are more likely to be temporary residents whereas landowners have a greater tendency to be permanent residents. The landowner has an investment in property which he cannot remove from the territory. His only escape is to dispose of his real estate; whereas the person who does not own land, but like the appellants owns only personal property, need only remove his person and property from the territory. We hold that the legislature adopted a reasonable classification in providing for remonstrance by those persons who owned real estate within the territory. The substantial nature of their interest and the immovability of the real estate justified the classification." (Appendix A, p. v)

Petitioners' complaint, as we have pointed out, refuted all of such findings with exception perhaps of the immovability of the real estate. (Tr. pp. 20-28).

The above reasoning is basically the same as that of the appellee, Union Free School District No. 15, in the Kramer case, supra, wherein the appellee argued that it was necessary to limit the franchise to those "primarily interested" in schools

in the district, that is, to those owning or leasing taxable real property in the district, and parents, or those having custody, of children enrolled in the local public schools. The Supreme Court of the United States answered as follows:

"Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See Carrington v Rash, supra, at 96, 13 L Ed 2d at 680." "***"

"Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable. See Harper v Virginia Bd. of Elections, 383 US 663, 670, 16 L Ed 2d 169, 174, 86 S Ct 1079 (1966). The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are

based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."

"The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment. States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters. However, once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Harper v Virginia Bd. of Elections, supra, at 665, 16 L Ed 2d at 171." "***"

"Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." "***"

"Appellant asserts that excluding him from participation in the district elections denies him equal protection of the laws. He contends that he and

others of his class are substantially interested in and significantly affected by the school meeting decisions. All members of the community have an interest in the quality and structure of public education, appellant says, and he urges that 'the decisions taken by local boards ... may have grave consequences to the entire population'. Appellant also argues that the level of property taxation affects him, even though he does not own property, as property tax levels affect the price of goods and services in the community. We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First, appellees argue that the State has a legitimate interest in limiting the franchise in school district elections to 'members of the community of interest'--those 'primarily interested in such elections.' Second, appellees urge that the State may reasonably and permissibly conclude that 'property taxpayers' (including lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district's schools are those 'primarily interested' in school affairs." "***"

"Whether classifications allegedly limiting the franchise to those resident citizens 'primarily

interested' deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions."

"***"

"But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of § 2012 are not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to appellant and members of his class. The judgment of the

United States District Court for the Eastern District of New York is therefore reversed. The case is remanded for further proceedings consistent with this opinion."

Thus also the classification in §48-702 permits inclusion of many persons who have, at best, a remote and indirect interest in annexation, and, on the other hand, excludes others who have a distinct and direct interest in annexation. See petitioners' complaint (Tr. pp. 20-27), wherein the allegations show a lesser interest in annexation on the part of the owners of the real estate in the territory sought to be annexed who do not reside therein than the owners of personal property of substantial value therein, who are and have been for several years last past resident and registered voters of the territory. Thus also, no articulated state interest is present in § 48-702. The requirements of § 48-702 are not sufficiently tailored to limiting the franchise to those having "a greater tendency to be permanent residents", supra, p. 17, even if that were true, the complaint to the contrary notwithstanding; for the reason that if such were true, which we dispute (e.g. the common knowledge of the hundreds of thousands of occupants of mobile homes owned or rented by them who are permanent residents and voters of the areas or parks wherein such homes are located, who work in the surrounding factories, businesses, stores or fields, and compose a substantial portion of the population, both young and old; and the

fruther common knowledge that a substantial portion of the population prefers to rent than to own homes and often live out their lives in rented homes as a matter or preference, for economic and other reasons), nevertheless such evidence (that inhabitants who do not own land are more likely to be temporary residents, whereas landowners have a greater tendency to be permanent residents) would be wholly insufficient to indicate that the interest of the land owner (resident or non-resident) in annexation would be substantially greater than the interest therein of the resident voter and owner of personal property solely.

The case of Rogers v City and County of Denver (1966), 161 Colo. 72, 419 P. 2d 648 cited in the opinion below of the Supreme Court of Indiana is of no real relevance in this petition, for the reason, firstly, it is not a decision of this court, secondly, the statute there involved did not provide for an election or the equivalent thereof, but was rather a proceedings to decide whether an election should be called, and thirdly, it did not appear that owners of personal property only had objected to the classification. So far as the theory that "inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the inhabitants of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legisla-

ture sees fit to make the statute conditional upon its acceptance by the affected territory" is concerned, such is not the case in the statute here involved. Here we have a statute which the legislature was not required to enact, but having done so, it is not authorized to grant privileges to some and not to others similarly situated. This is true of a myriad of statutes creating rights or privileges not theretofore held by those to whom such statutory rights or privileges are granted; but in doing so, the legislature may not be arbitrarily discriminatory. In the case at bar the legislation is arbitrarily discriminatory. As stated in the Kramer case,

> "States do have latitude in determining *** whether various questions shall be submitted to the voters. ***. However 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'" 23 L Ed 2d, at p. 591.

The Cipriano case is perhaps even more similar to the case at bar on the facts. In Cipriano the Louisiana statute excluded non-property owning voters from participation in a special election held by the City of Houma on question of whether or not revenue bonds of the municipal utility of the City should be issued to obtain funds for extension and improvement of the utility system. Cipriano, a qualified voter, but without

property, brought suit in U.S. District Court to enjoin the bond issue and for declaratory judgment of unconstitutionality of the statute. Upon dismissal of the suit by the District Court, Cipriano appealed directly to the Supreme Court of the United States. The majority opinion followed the Kramer case, and upon the same reasoning, reversed the lower court.

It is submitted that the facts of the instant case do clearly fall in the same class as those of the Kramer and Cipriano cases; that the reasoning of the said cases applies in like manner to the case at bar.

We contend lastly, in answer to questions (1) and (2), pp 3 and 4, supra, that not only is the statute here in question in the same class with those of Kramer and Cipriano and subject to the same reasoning employed by the majority of the court in said cases, and therefore unconstitutional, but that said statute is also violative of the equal protection of the laws clause on the ground that it involves a "voting classification wholly irrelevant to achievement of the state's objective" just as the statute in the Cipriano case was so held by Justices Black and Stewart in that case. See Summary, 23 L Ed 2d 647. Thus also, the granting of the remonstrance privilege (the privilege of voting against the public measure here involved) to land owners exclusively, resident and non resident alike, while at the same time excluding from such

privilege permanent residents who were voters of the territory and owners of personal property, both tangible and intangible of substantial value, located in the territory throughout the period of the residence therein of said owners, had no relevance to the achievement of the state's objective in the statute here in question.

In the event the court is of opinion that the petitioners are not entitled to judgment of the statute's violation of the Equal Protection Laws Clause on the present record, it is submitted that they are entitled to reversal and order remanding the case to the trial court for hearing of evidence on the allegations of the petitioners' second amended and supplemental complaint, whether or not this court considers the case as one involving "elections". Borden's Farm Products Co. v. Baldwin (1934), 239 U.S. 194-213, 79 L ed 281.

CONCLUSION

In conclusion it is submitted that the questions herein raised: - of whether or not the statute in the instant case is within the prohibitions laid down in the Kramer and Cipriano cases; of whether or not the statute is arbitrary on its face in that there is no relevance between the granting of exclusive privilege of remonstrance to some while excluding the such privilege from others equally interested, and the achievement of the State's objective in the statute; and of whether or not the judgment should be reversed and remanded for hearing of

evidence on the second amended and supplemental complaint:- are all truly substantial, and present to this Court far reaching issues of great public importance, and should be answered.

Respectfully submitted,

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APPENDIX A

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IN THE
SUPREME COURT OF INDIANA

WILLODEAN FORKS CONRAD FORKS KALEEN KEHOE RICHARD L. KEHOE, JR. STEVEN M. KERR LYNN K. COYLE WILLIAM M. COYLE MARY C. GROVER, APPELLANTS	)	No. 171 S 11
v.	)	
CITY OF WARSAW, INDIANA APPELLEE	)	

APPEAL FROM KOSCIUSKO CIRCUIT COURT
The Hon. Harold D. Stump, Special Judge

GIVAN, J.

This is an appeal from a judgment sustaining a motion to dismiss appellants' second amended and supplemental complaint to set aside and vacate Ordinance No. 535 of the City of Warsaw, Indiana. The ordinance purported to annex certain territory to the City of Warsaw. The appellants do not own real estate located within the territory sought to be annexed. They do, however, own "mobile homes *** and are owners of other tangiable and intangible personal property in the territory ***." The prayer of appellants' complaint asked that Burns Ind. Stat., 1963 Repl., §§ 48-701-702 be declared in violation of Article 1, § 23 of the Constitution of Indiana and the Fourteenth Amendment to the Constitution of the United States in that the statute provides for remonstrance by owners of real estate only, thus denying equal protection of the laws to other residents of the affected territory. Appellants thus contend that Ordinance No. 535 of the City of Warsaw enacted under authority of an unconstitutional statute is, therefore, void. Appellee's motion to dismiss was filed under the Rules of this Court, TR 12(B)(6) upon the contention that the complaint failed to state a claim upon which relief could be granted. This Court has jurisdiction of this case under Burns Ind. Stat., 1968 Repl., § 4-214 which statute provides for cases questioning the constitutionality of a statute or an ordinance of a municipal corporation to be appealed directly to this Court.

Appellants first claim the trial court erred in sustaining the motion to dismiss claiming that if a case is well pleaded, judgment should be made on the basis of facts presented. However, in the case at bar there is no contest of the facts. The facts are completely presented by appellants' complaint and the exhibits attached thereto. These facts are quite simple as above set out and are not contested by the appellee. Therefore, under paragraph 8 of TR 12 the trial court was justified in rendering judgment upon the pleadings in response to appellee's motion to dismiss. Prior to the adoption of Rule 12, the law had been that if it appears to a certainty that no relief can be granted under any set of facts which can be proved in support of the allegations in a complaint, then dismissal is proper. Conley v. Gibson (1957), 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. In the case at bar the appellants have stated they resided in the territory sought to be annexed; that they do not own real estate in that territory and, therefore, cannot file a remonstrance under the statute, thus the statute is unconstitutional in denying them equal protection of the law. The motion to dismiss admits these facts. 21 I.L.E., Pleading and Pretrial Practice, § 103, page 265. The only issue, therefore, before the trial court was the determination as to whether or not the statute was constitutional in view of the existing factual

situation. We hold the trial court did not err in summarily disposing of the case upon the pleadings.

We thus come to the question as to whether or not the statute here challenged is unconstitutional as claimed by the appellants. The legislature has the power to authorize the extension of the boundaries of a municipal corporati The individual property owner does not have a vested interest in the maintenan of those boundaries at any particular location. Woerner, etc. v. City of Indianapolis (1961), 242 Ind. 253, 177 N.E. 2d 34. The General Assembly of Indiana has chosen to give a statutory right of remonstrance to owners of land located within territory sought to be annexed by a municipal corporation as provided in the statute here challenged. Prior to the passage of the above statute this Court had held that territory may be annexed with or without the consent of the inhabitants therein. Taggar Auditor et al. v. Claypool (1896), 145 Ind. 590, 44 N.E. 18. The question is then, did the legislature by giving the right of remonstrance to some of the inhabitants within the territory deny equa protection to those residents who were not given the right of remonstrance? I is well established that the equal protection clause does not prevent reasonable classification. Morey v. Doud (19 354 U.S. 457, 77 S. Ct. 1344, 1 L.Ed. 2d. 1485; McErlain v. Taylor (1934), 207 Ind. 240, 192 N.E. 260. In order to be reasonable the classification must

not be arbitrary or capricious, and it must bear a reasonable relation to the object of the legislation. Morey v. Doud, supra, Bolivar Twp. Bd. of Finance v. Hawkins (1934), 207 Ind. 171, 191 N.E. 158. There can be no question but that an annexation affects all persons residing within the territory. However, there are substantial differences which warrant the legislative classification in the statute in question. Inhabitants who do not own land are more likely to be temporary residents, whereas landowners have a greater tendency to be permanent residents. The landowner has an investment in property which he cannot remove from the territory. His only escape is to dispose of his real estate; whereas, the person who does not own land, but like the appellants owns personal property, need only remove his person and property from the territory. We hold that the legislature adopted a reasonable classification in providing for remonstrance by those persons who owned real estate within the territory. The substantial nature of their interest and the immovability of the real estate justifies the classification.

This general principle of law was recognized by the Colorado Supreme Court in Rogers v. City and County of Denver (1966), 161 Colo. 72, 419 P. 2d 648. This case had a factual background stronger than that presented by the appellants in this case. In the Colorado case the appellant landowners had signed a petition to avoid annexation; however,

a number of those signing were rejected by the City Council for the reason that they had purchased their land in the year 1964 and were, therefore, not liable for any property tax in the year of 1963, which was the year next preceding the year in which the petition was filed. The statute in question defined a landowner as an owner in fee who in the next preceding calendar year becomes liable for a property tax thereon. The Colorado Supreme Court held that the provisions of the statute cannot violate the appellants' right to equal protection and in so doing quoted from 37 Am. Jur. at page 648 as follows:

> "'Consent of Inhabitants.--It is well settled that the legislature may...authorize the annexation of, contiguous or other territory without the consent or even against the remonstrance of persons residing therein. The legislature may, however, and usually does, provide for such consent as a condition of annexation. Inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the inhabitants of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legislature sees fit to make the statute conditional upon its acceptance by the affected territory.'"
> 161 Colo. at p. 74.

The Colorado Court went on to say:

> "...(I)t is said that, absent constitutional restrictions, the several

state legislatures enjoy 'unlimited powers' over the annexation of territory by municipalities and may place 'any requirement or condition thereon.'" 161 Colo. at p. 75.

Appellants next contend that the remonstrance provided for in the statute is an election for a special purpose and as such denies the appellants, who are registered voters, equal protection of the law. With this we cannot agree. A remonstrance is not an election in any sense of the word. Appellants quote from 25 Am. Jur. 2d, Elections, §1, page 691 as follows:

"An election may be broadly defined as the expression of a choice by the voters of a body politic, or as the means by which a choice is made by the electors. In a more restricted sense, an election is a choosing or selection, by those having a right to participate, of persons to fill public offices or of public measures which shall be adopted or rejected."

Burns Ind. Stat., 1970 Supp., § 29-2802 defines election as follows:

"'Election.' The word 'elections' ('election') shall mean and include any election at which the electors of the state or of any sub-division thereof nominate or choose by ballot public officials or decide any public question lawfully submitted to them."

The definitions above quoted are broad enough to cover both the choice of

individuals to hold public office and the submission of a public question for referendum. The Indiana Legislature might well have provided for a referendum on questions of annexation; however, this they did not choose to do. In a referendum, the question is submitted to the entire voting public for a choice. The purpose of a remonstrance is to afford the opportunity to any person seeking to object to the proposed action of a body politic by taking the affirmative step to register their objection. We, therefore, hold that the right to remonstrate as provided by the statute in question is not an election to the extent that all voters in the community must be afforded the opportunity to participate. We find no error on the part of the trial court.

The trial court is, therefore, affirmed.

ARTERBURN, C.J., and HUNTER and PRENTICE, J.J., concur; DeBRULER, J., concurs in result with opinion.

IN THE
SUPREME COURT OF INDIANA

WILLODEAN FORKS, et al.,)
)
Appellants,)
)
v) No. 171 S 11
)
CITY OF WARSAW, INDIANA,)
)
Appellee.)

APPEAL FROM KOSCIUSKO CIRCUIT COURT

DeBRULER, J. - Concurring in Result

If appellants had objected to the summary procedure adopted by the trial court, either in the trial court or in their brief on appeal, I would vote to remand this case to the trial court for a full trial. In every case dealing with a constitutional claim, an unrestricted opportunity should be afforded the litigants to completely present the facts necessary to support their claims. However, in my view of the record and briefs in this case, appellants have never contended that the trial court committed error in making a summary disposition of their constitutional claim. Thus, because of the posture of this case, I would concur in the result of the majority opinion wherein it holds that the trial court did not commit error in this case by following a summary type procedure.

An extraordinary burden rested on appellants to establish by proof that

this classification is arbitrary and unreasonable. That burden was described in Borden's Farm Products v. Baldwin (1934), 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed.281, as follows:

> "Respondents invoke the presumption which attaches to legislation action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such it is a rebuttable presumption (cases cited). It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assult. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge of other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. (cases cited)" 293 U.S. at 209.

Appellants plead in their complaint that they are permanent residents and registered voters of the territory sought t be annexed and that they own personal property located in the territory of substan value. They also plead that their stake in the proposed annexation is equal to th of owners of real estate in the territory

and that they have an equal interest in taxation, schools, roads, storm or sanitary sewers, water, electricity, fire and police protection, sidewalks and curbs, garbage collection and recreational programs. I would affirm the trial court judgment on the grounds that these allegations in the complaint are too general and unsupported to satisfy appellants' extraordinary burden of establishing that this classification was arbitrary and unreasonable.

APPENDIX B

Pertinent Parts of Trial Rule 12

" ***

(B) *** at the option of the pleader, the following defenses may be made by motion:

***

(6) failure to state a claim upon which relief can be granted, ***.

***

If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. ***."

Pertinent Parts of Trial Rule 56

(A) For claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(B) For defending party--When motion not required. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is

sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.

APPENDIX C

(395 US 621)
MORRIS H. KRAMER, Appellant,

v

UNION FREE SCHOOL DISTRICT NO. 15 et al.

395 US 621, 23 L Ed 2d 583, 89 S Ct 1886

(No. 258)
Argued January 16, 1969
Decided June 16, 1969

SUMMARY

A bachelor who lived with his parents in a certain school district in New York and neither owned nor leased taxable real property in the school district but was otherwise eligible to vote in the school district elections brought a suit in the United States District Court for the Eastern District of New York against the school district and each member of its board of education, claiming that § 2012 of the New York Education Law, which requires, for eligibility to vote in certain school district elections, either (1) ownership (or leasing) of taxable real property in the district or (2) parenthood (or custody) of children enrolled in the local public schools, violated the equal protection clause of the Fourteenth Amendment. The District Court, denying his request that a three-judge District Court be convened, dismissed his complaint (259 F Supp 164). On appeal, the

United States Court of Appeals for the Second Circuit reversed, ruling that the complaint warranted convening a three-judge court (379 F2d 491). On remand, the three-judge District Court ruled that § 2012 was constitutional and dismissed the complaint (282 F Supp 70)

On direct appeal, the United States Supreme Court reversed and remanded. In an opinion by WARREN, Ch. J., expressing the view of five members of the court, it was held that since the classification in § 2012 of the New York Education Law permitted inclusion of many persons having only a remote and indirect interest in school affairs, while excluding others having a distinct and direct interest, the section violated the equal protection clause of the Fourteenth Amendment.

STEWART, J., joined by BLACK and HARLAN, JJ., dissented, stating that the legislative classification was rationally related to a legitimate legislative purpose and that the court's decision could only be viewed as irreconcilable with the established principle that the states have broad powers to determine the conditions under which the right of suffrage may be exercised.

APPENDIX D

(395 US 701)
JOSEPH Q. CIPRIANO, Appellant,

v

CITY OF HOUMA et al.

395 US 701, 23 L Ed 2d 647, 89 S Ct 1897

(No. 705)
Argued April 24, 1969.
Decided June 16, 1969.

SUMMARY

An otherwise qualified voter of the City of Houma, Louisiana, who paid no property taxes, brought suit in the United States District Court for the Eastern District of Louisiana to enjoin the issuance of municipal utility revenue bonds approved at a special election from which he had been excluded. He also sought to obtain a declaratory judgment that a Louisiana statute limiting the franchise in such elections to property taxpayers was unconstitutional. A three-judge Federal District Court dismissed the suit, finding the statutory provisions constitutional (286 F Supp 823).

On direct appeal, the United States Supreme Court reversed and remanded. In a per curiam opinion, expressing the view of five members of the court, it was held that the challenged provisions violated the equal protection clause of the Fourteenth Amendment.

BLACK and STEWART, JJ., concurred in the judgment of the court on the ground that the case involved a voting classification wholly irrelevant to achievement of the state's objective.

HARLAN, J., concurred in the result because, while adhering to his view that the equal protection clause does not extend to state political systems, he considered himself bound by prior United States Supreme Court decisions to the contrary.

APPENDIX E

Chapter 208, Sec. 1, p. 680 of the 1945 Acts of the General Assembly is the Indiana Election Code. Section 2 thereof was amended by the 1965 Acts, Ch. 261, p. 683, to read as follows:

"Sec. 2. When used in this Act the words and terms set out shall be construed as follows:

"***"

" 'Election': The word 'elections' ['election'] shall mean and include any election at which the electors of the state or of any subdivision thereof nominate or choose by ballot public officials or decide any question lawfully submitted to them."

"***"

FILE COPY

Supreme Court, U. S.
FILED
JUN 14 1972
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

No. 71-1175

Willodean Forks
Conrad Forks
Kaleen Kehoe
Richard L. Kehoe, Jr.
Stephen M. Kerr
Lynn K. Coyle
William M. Coyle
Mary C. Grover, Petitioners,

V.

City of Warsaw, Indiana, Respondent

On Petition for Writ of Certiorari to the
United States Supreme Court

Brief For the Respondent

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Statement

On March 29, 1969, the City of Warsaw, Indiana, enacted Ordinance No. 535, by which ordinance it annexed certain territory to the City. This ordinance was enacted pursuant to authority given by Chapter 269, Sections 1 and 3 of the Acts of the General Assembly of Indiana of 1955 (Burns Ind. Statutes, Sections 48-701 and 48-702) which was in effect at that time, although since repealed, effective January 1, 1970, by Chapter 239, Section 8 of the Acts of 1969. Section 1 of the 1955 Acts generally provided, insofar as here applicable, that the common council of a city could annex contiguous territory by ordinance, which ordinance could include terms and conditions, deemed reasonable by said common council, relating to any matter reasonably and fairly calculated to render such annexation just and equitable both to the property owners and inhabitants of the city and the territory annexed. Section 3 of said Acts generally provided that a majority of the owners of land in the annexed territory or the owners of seventy-five per cent in assessed valuation of the real estate in the annexed territory, could file a remonstrance against the annexation in the circuit or superior court of the county, and if this was done the burden was on the city to demonstrate to the court, by the presentation of evidence, that six determinants were present, said determinants relating to whether the annexation was in the best interests of both the city and the annexed territory, the fairness of the terms and conditions contained in the ordinance, the financial ability of the city to provide municipal services to the annexed area, etc. In the event the court found all determinants were present the annexation would take place, otherwise not.

The petitioners, who did not own land but owned personal property only in the annexed area, filed their complaint in the circuit court alleging, insofar as here applicable, that the statute under which the ordinance was enacted was in violation of the equal protection of laws provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason it restricted the right to remonstrate to owners of land only in the annexed area, which restriction constituted an arbitrary classification. Petitioners also claimed that the remonstrance provisions of the statute constituted an "election" and the right to "vote" was denied them.

ARGUMENT

I

THE DECISIONS OF THE INDIANA SUPREME COURT IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A.

The remonstrance procedure of Indiana annexation statute is not an "election", and does not conflict with the "Kramer" and "Cipriano" decisions of this Court.

Implicit in the definition of the word "election" is the casting of ballots, counting them, and making the return, which return, by its numbers, determines the selection of persons to fill public offices or determines the adoption or rejection of public measures. See 25 Am. Jur. 2nd, Elections, sec. 1; 29 Corpus Juris Secundum, Elections, sec. 1.

Burns Ind. Stat., 1970 Supp., Sec. 29-2802 defines election as follows:

"'Election'. The word 'elections' ('Election') shall mean and include any election at which the electors of the state or of any subdivision thereof nominate or choose by ballot public officials or decide any public question lawfully submitted to them."

The remonstrance procedure of the statute in question provides who may file a complaint in court to require the annexing city to prove, by evidence, to the court that certain determinants set forth in the statute exist before the annexation shall become effective. It is not a choice by the people that determines the issue. One hundred per cent of the affected people could remonstrate, and this would have no bearing whatsoever on the question to be decided by the court.

It was not at all necessary that the legislature give the right to remonstrate to anyone. It has long been recognized by this Court that a state legislature may authorize the annexation of territory by a municipality without the consent of persons residing therein. Hunter v. Pittsburg, 207 U.S. 369.

The Indiana Legislature, as pointed out in the Indiana Supreme Court opinion, could have provided for a referendum (or a regular election) on questions of annexation. This they did not choose to do. Providing for a court hearing is a far cry from an election. For these reasons, the law set forth by this Court in the two cases relied upon by petitioners, Kramer v. Union Free School District, 395 US 621 and Cipriano v. City of Houma, 395 US 701, are not in point, as the Kramer case involved electing members of a district school board, and the Cipriano case involved an election called to approve the issuance of revenue bonds by a municipal utility, both clearly

factual situations involving "elections". The constitutionality of the Indiana statute must therefore be determined according to legal precedence set forth by this Court in cases other than those involving election laws.

B.

The Indiana legislature, by giving landowners in the area to be annexed the right to remonstrate, and by failing to give the same right to tenants residing in said area, did not create an arbitrary or capricious classification in violation of the equal protection clause of the Fourteenth Amendment.

This Court has long recognized that the equal protection clause of the Constitution does not prohibit legislative classifications by the states and the imposition of statutory restraints on one class which are not imposed upon another class, but such classification is only required to be reasonable, and not arbitrary. In 1911, in the case of Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, this Court set forth four rules that had theretofore guided the Court in determining whether classifications made by state statutes offend against the equal protection clause. These were:

> "1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits to the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that

clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary."

And the rule has gone even farther when the classification involves a municipal corporation in its relationship with municipal property. Hunter v. Pittsburg, 207 U.S. 161. There this Court stated: "Municipal Corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be instructed to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the sound discretion of the state . . . In all these respects the state is supreme, and its legislative body, conforming its actions to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

In any event, the reasonableness of the classification here involved, as shown by the opinion of the Indiana Supreme Court, cannot be seriously questioned. After all, it was land that was being annexed, and the

land will remain annexed throughout the future. The tenants, and their personal property, are prone to be transitory, and they may remove themselves and their personal property completely from the city boundaries.

Petitioners appear to argue that they will suffer inequities by reason of the annexation. But, as stated in 16 Am. Jur. 2nd, Constitutional Law, Section 494: "As a matter of fact, as some of the courts have remarked, all legislation involves classification; from the earliest days classification has been made by legislatures whereby some people have rights or suffer burdens which others do not. A defferentiation is not necessarily a discrimination. And since the very idea of classification is inequality, inequality in no matter determines the question of constitutionality."

II

Assuming, arguendo, that the classification made by the legislature is arbitrary and void, the section of the act authorizing remonstrances is separate and apart from the section authorizing the annexation to take place, and if stricken out a complete and valid statute would remain.

The first section of the statute (Burns 48-701) authorizes the city to annex territory. The second section (Burns 48-702) provides for the filing of remonstrances.

The Indiana Supreme Court, in 1896, considered a similar attack on the remonstrance provisions of the then annexation law, and held that the remonstrance

provisions could be eliminated without in any way impairing the force of the statute authorizing common councils to annex territory. Taggart v. Claypool, 145 Ind. 590, 44 N.E. 18. See El Paso and N.E.R. Co. v. Gutienez, 215 U.S. 87. As the legislature could have provided for annexation without granting the right to remonstrate, a valid act would remain.

III

PETITIONERS HAVE NO STANDING TO QUESTION THE CONSTITUTIONALITY OF THE STATUTE, AS THE RECORD SHOWS THEY HAVE SUFFERED NO INJURY.

Petitioners' complaint (Tr. pp. 31-37) by rhetorical paragraph 9, discloses that a remonstrance was filed to ordinance 535 in the circuit court, and was pending when the amended complaint in this action was filed. Thus a court determination of the existence of the statutory determinants was assured petitioners. They therefore have suffered no injury. 16 Am. Jur. 2d Constitutional Law, Sec. 123.

Conclusion

It is submitted the petition should be denied.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1971

Supreme Court, U. S.
FILED
JUN 24 1972
MICHAEL RODAK, JR., CLERK

No. 71-1175

Willodean Forks
Conrad Forks
Kaleen Kehoe
Richard L. Kehoe, Jr.
Stephen M. Kerr
Lynn K. Coyle
William M. Coyle
Mary C. Grover, Petitioners,

v.

City of Warsaw, Indiana, Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

---

PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

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In The
SUPREME COURT OF THE UNITED STATES
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No. 71-1175

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258 US 50, 66 L ed 458, 42 S Ct 250. . . 5
Lindsley v Natural Carbonic Gas Co.
(1911), 220 US 61. 3
Morey v Doud (1957) 354 US 457, 77 S ct
1344, 1 L ed 2d 1485,. 4,11
Taggart v Claypool (1896), 145 Ind
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CONSTITUTIONAL AND STATUTORY PROVISIONS

Burns Indiana Statutes, §§48-701
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City and Town Act of 1969, 1969 Acts (Annexation,p.904)	1,6,7,8,9
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Equal Protection of the laws clause, 14th Ammendment	4,5,9,11

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-1175

Willodean Forks, et al, Petitioners
v
City of Warsaw, Indiana, Respondent

PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

THE REPEAL OF BURNS INDIANA STATUTES, §§48-701 and 48-702, HERE INVOLVED, AS REPORTED AT PAGE 1 OF RESPONDENT'S BRIEF DID NOT APPLY TO LITIGATION PENDING JANUARY 1,1970, INCLUDING THE CASE AT BAR.

The repeal of said sections was part of the City and Town Act of 1969, enacted March 14, 1969, effective January 1, 1970, and was limited as follows:-

> "The repeals consummated by section 8 of this act shall not be construed as affecting any litigation pending at the time this act takes affect nor as an abrogation or impairment of rights, privileges, powers or duties that have vested or may vest on behalf of or against a city or town or any person, firm, association or corporation and each and all of them shall be enforceable to the same effect and subject to the same provisions and limitations as if this act had not become law." (1969 Acts. p. 922).

The sections in the 1969 Act comparable to the Burns Indiana §§48-701 and 48-702 here involved appear infra, pages 7 to 9 inclusive.

RESPONDENT DOES NOT DENY THE ERRORS OF FACT IN THE OPINION BELOW LISTED IN PARAGRAPHS NUMBERED (1), (2), (3), (4) and (6), PAGES 8 to 15 OF THE PETITION.

The Respondent, by complete silence, impliedly concedes the errors of fact in the opinion below as set out in paragraphs (1),(2),(3),(4), and (6) of the "Errors of Fact in Opinion Below" at pages 8 to 15 inclusive of the petition. The accuracy of the said paragraph (6) at pages 12 to 15 inclusive, in setting out the true guidelines for analysis of the petitioners second amended and supplemental complaint, is sufficient in and of itself to require at least a reversal and remand of the case to the trial court for hearing of evidence on the allegations of such complaint. Borden's Farm Products Co. v Baldwin, cited at pages 4 and 26 of the petition. The error of fact in the opinion, that the trial court followed a summary type procedure (pages 7 and 12 of the petition), and the consequent failure to follow the controlling cases of Borden's, supra, Tahir Erk v Glen L. Martin Co., cited at page 13 of the petition, and the Indiana case of Heckler v Conter, Treas., cited and quoted at pages 13 to 15 inclusive of the petition, has contributed to the error in the decision below. Surely the second amended and supplemental complaint, when properly and correctly considered "in the light most favorable" to the Petitioners "with every intendment regarded" in their favor, can not be dismissed on ground of failure to constitute a claim. Tahir Erk v Glen L. Martin Co., supra. The Respondent does deny the paragraph (5) at pages

10 to 12 inclusive of the petition, in regard to "election"; and Petitioners' handling thereof follows next.

IN RE RESPONDENT'S CONTENTION THAT THE REMONSTRANCE PROCEDURE OF §48-702 IS NOT AN ELECTIVE PROCESS, AND DOES NOT CONFLICT WITH THE KRAMER AND CIPRIANO CASES

Such contention appears under paragraph A at pages 2 to 4 inclusive of Respondent's brief; is simply a reiteration of the reasoning of the majority opinion of the Court below. Any reply would be repetition of the whole of the petition for certiorari, to which we respectfully refer the Court.

REPLY TO RESPONDENT'S ANSWER THAT THE STATUTE DID NOT CREATE AN ARBITRARY OR CAPRICIOUS CLASSIFICATION.

Respondent's position here is under paragraph B at pages 4 to 6 inclusive, where the cases of Lindsley v Natural Carbonic Gas Co. (1911), 220 US 61, and Hunter v Pittsburg (1907), 207 U.S. 161, are cited for the first time.

Lindsley merely presents an example of where discrimination may be justified for the purpose of protecting the public. In Lindsley it is stated:

> " * * *. Thus, it may well be that in actual practice the pumping is not excessive or wasteful save when it is done for the purpose proscribed.
>
> "These considerations point with more or less persuasive force to a substantial difference, in point of harmful results, between pumping from

wells penetrating the rock and pumping from those not penetrating it, and between pumping for purpose of collecting and vending the gas apart from the waters and pumping for other purposes. If there be such a difference it justifies the classification for plainly a police law may be confined to the occasion for its existence."

Thus, the classification in Lindsley did have relation to the purpose for which classification was made; but in the statute here involved the exclusion of resident owners of personal property had no relation to the purpose of providing a process by which the question of annexation might be resolved. There is nothing whatsoever to indicate that exclusion of the petitioners from participation in such process was for the public welfare. Compare Morey v Doud (1957)354 U.S. 457, 77 S Ct 1344, 1 L ed 2d 1485, cited in the opinion below, and the minority opinions in the Kramer and Cipriano cases.

In Hunter v Pittsburg, the Pennsylvania statute in question provided for the annexation of a lesser city and intervening land by a greater city by an election held of all the legal voters of both cities and the intervening land. No objection was raised that the statute was in violation of the equal protection of the laws clause. The statute was upheld as against objections other than those involved in Burns §48-702. The statute does serve as an illustration of a reasonable classification and an unobjectionable method of determining whether or not annexation should take place. The right to participate in the election was not made to depend upon

ownership of property of any kind, much less upon ownership of property of a certain type, as it is in the §48-702 here involved.

Thus, neither the Lindsley nor Hunter cases justifies the classification in the Burns Indiana Statutes §48-702, but by way of contrast, each makes clearer the invidious character of the discrimination of the said section.

TWO CONTENTIONS IN RESPONDENT'S BRIEF WERE NOT REFERRED TO IN THE DECISION BELOW. SAID CONTENTIONS ARE AS FOLLOWS:

The First Contention

The first of such contentions is the paragraph II at pages 6 and 7 of such brief to the effect that the first section of the statute (Burns §48-701) would remain in force even though the remonstrance section (Burns §48-702) was stricken. In support of such position Respondent cites Taggart v Claypool (1896), 145 Ind. 590, 44 N.E. 18, and El Paso and N.E.R. Co. v Gutierrez (1909), 215 U.S. 87.

Such contention was made in Respondent's brief in the appeal below where, however, only the Taggart Case was cited. The Taggart case was met by petitioners' reply brief, at pages 19 to 34 inclusive thereof. The rule that "the invalidity of one section of a statute which is in material relation to its other portions so as to modify, restrict, or extend its application will cause the failure of such other portions also" (16 Am Jur 2d 422, n13, Lemke v Farmers' Elevator Co. (1922) 258 U.S. 50, 66 L ed 458, 42 S Ct 250), the general rule that if a proviso

operates to limit the scope of the act in such a manner that by striking out the proviso "the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent" (16 Am Jur 2d 425, n5, Frost v Corporation Com. (1942), 278 U.S. 515, 73 L ed 483, 49 S Ct 235, Ettinger v Studevant (1942), 219 Ind 406, 38 NE 2d 1000), and the rule that "absent a legislative declaration that invalidity of a portion of the statute shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety or not all" (16 Am Jur 2d 420 n3, Carter v Carter Coal Co. (1936), 298 U.S. 238, 80 L ed 1160, 56 S Ct 855), all apply to the statute in the Taggart case, and the more so to the §§48-701 and 48-702 here involved because of the provisions added in the remonstrance section 48-702 to those of the comparable section of the statute in the Taggart case. In each statute the ordinance section is expressly made conditional upon the provisions of the remonstrance section by the following language:

> " * * * a certified copy of such ordinance shall be conclusive evidence that the territory therein described was properly annexed and constitutes a part of such city, <u>except as provided in the next section."</u> (our underlining). Taggart v Claypool, supra.

The comparable sections 402 and 406 of the City and Town Act of 1969, enacted

March 14, 1969, effective January 1, 1970, are likewise tied together by the following provision of §402, to wit:

> "The annexation ordinance shall become final and binding sixty (60) days after the final publication thereof in the absence of remonstrance and appeal as provided by section 406 of this article." 1969 Acts p 904.

The said sections 402 and 406 appear as §§48-717 and 48-721 in Burns Indiana Statutes, 1971 Supplement, and are respectively as follows:

> "48-717. Annexation of lands by separate ordinance not defining corporate boundaries.-The common council may also, by separate ordinance not purporting to define the entire boundaries of the city, annex contiguous territory, whether platted or not, to the city, and may include such terms and conditions as hereinafter defined, as may be deemed just and reasonable by the common council, and a certified copy of the ordinances shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of the city. The annexation ordinances shall become final and binding sixty (60) day after final publication thereof in the absence of remonstrance and appeal as provided in section 406 (§48-721) of this article. Immediately after the passage of every such ordinance the same shall be published once each week for at least two (2) consecutive weeks in accordance with Chapter 96, Acts of 1927 (§§49-701-49-709), as amended.

(Acts 1969, ch.239, § 402, p. 894.)"

"48-721. Remonstrance against annexation - Procedure.- Whenever territory is annexed to a city, whether by general ordinance defining the city boundaries or by special ordinance for the purpose of annexing territory, an appeal may be taken from the annexation by either a majority of the owners of land in the territory or by the owners of more than seventy-five per cent (75%) in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected, by filing their remonstrances in writing against the annexation, together with a copy of the ordinance, in the circuit or superior courts of the county where the territory is situated or with the judge thereof in vacation within sixty (60) days after the last publication provided for in section 402 (§48-717) of this article. The written remonstrance or complaint shall state the reason why annexation should not in justice take place.

"Upon receipt of the remonstrance, the court or the judge thereof in vacation shall determine whether it bears the necessary signatures and complies with the requirements of sections 406 through 408 (§§48-721-48-723) of this article. In determining the total number of landowners of the area and whether or not signers of the remonstrance are landowners, the names as they appear upon the tax duplicate shall be prima facie evidence of ownership. In ascertaining the number of landowners of the area and for the purpose of determining

the sufficiency of the remonstrance as to the number of landowners required to constitute a majority, not more than one person having an interest in a single property, as evidenced by the tax duplicate, shall be considered a landowner.

"Upon the determination of the judge of the court that the remonstrance is sufficient he shall fix a time for a hearing on the remonstrance which shall be held not later than sixty (60) days thereafter. Notice of the proceedings by way of summons shall be served upon the proper officers of the city seeking to make annexation, and the city shall become defendant in such cause, and shall be required to appear and answer as in other cases. (Acts 1969, ch.239, §406, p.894.)"

The above sections 48-717 and 48-721 indicate, (1), the legislature's intention that the sections are inseparable for the same reasons that the §§48-701 and 48-702 here involved are inseparable, and (2), that the same violation of the equal protection of the laws clause of the 14th Amendment is continued in the new 1969 Acts. Further, the language of the Taggart opinion supporting retention of the ordinance section of the statute in event the remonstrance section was stricken, was in effect, obiter dicta, in view of the court's sustaining of the remonstrance provision on ground that the limitation of right of remonstrance to resident landowners only, while denying such right to non resident land-

owners, presented a reasonable classification; and finally, such obiter dicta of severability in such type of statute was overruled in the case of Ettinger v Studevant (1942), supra, cited and followed in Hayes v Taxpayers Ass. (1947), 225 Ind 242, 72 NE 2d 658; and by the conclusion in the case of Arnholt v City of Columbus (1957), 128 Ind. App. 253, 145 NE 2d 660, wherein the court stated that "annexation to a city is no longer a discretionary act," a conclusion necessarily predicated on the assumed validity of the remonstrance section of the Annexation Act.

Thus, it is clear that the Court below did not consider the severability theory as valid in the statute here involved. The El Paso case of this Court cited by Respondent merely illustrates what may and what may not be severable. In El Paso Congress undertook to control employers' liability compensation in interstate, state, territories and in the District of Columbia. The attempt to include control of such liability in states, as well as in interstate commerce, was so combined as to render the whole of such part of the statute unconstitutional; but as to the part controlling such liability in the Territory of Texas, which was not involved in the question of violation of the Interstate Commerce Clause, there was no impediment to its severability as constitutional. Thus in El Paso there were two separate categories each independent of the other, the one invalid, the other valid. In the statute here in question there is only one cate-

gory, that of annexation subject to the provisions of the remonstrance section 48-702. The statute in the case of Morey v Doud (1957) 354 U.S. 457, 1 L ed 2d 1485, 77 S Ct 1344, cited in the opinion below, is comparable in this, that an invalid exception of a certain corporation from the operation of the statute was held to be inseparable, and the statute therefore was held wholly void as violative of the equal protection of the laws clause of the 14th Amendment.

The Second Contention

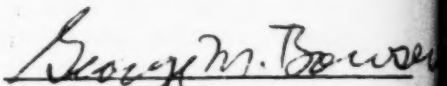
The second of Respondent's contentions not referred to by the Court below, is presented here for the first time, i.e., the contention in the paragraph III on page 7 of the brief, to the effect that petitioners were assured of a court determination of the requisite determinants by reason of the remonstrance to the Ordinance 535 filed by owners of land in the territory sought to be annexed, and that therefore petitioners have suffered no injury. As above stated, such contention was not presented to the trial court or to the Court below. The answer to the contention is, first, that the remonstrance referred to was of a minority of those landowners eligible to remonstrate, as alleged in sub-paragraph (k) of rhetorical paragraph 6 of petitioners' second amended and supplemental complaint here in question (Tr pp 19 to 37 incl.), thereby eliminating, by the provisions of §48-702, the court determination otherwise granted to landowners; and second, equally af-

fected as they are with owners of land in the territory, by annexation, the petitioners, as resident owners of personal property only in the territory, are injured by the denial of the privilege of participating in the proceedings provided by §48-702 in the same manner and degree as the landowners of the territory are permitted to participate. See the majority and minority opinions in the Kramer and Cipriano Cases of the original petition.

CONCLUSION

The petitioners therefore submit that no reason appears for any change in the conclusion of the petition for certiorari at pages 26 and 27 thereof, and pray that the petition be granted.

Respectfully submitted,



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